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No. 197

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

CAROLINA FREIGHT CARRIERS CORPORATION, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT	4
Proceedings in Court Below	11
SPECIFICATIONS OF ERRORS TO BE URGED	12
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. The Commission correctly interpreted the grandfather clause as authorizing certificates for carriage of general commodities throughout a wide area, over irregular and unspecified routes, only when it can find from the evidence that the carrier's right thereto has been proved by a substantial showing of service rendered sufficient to establish bona fide operations	16
The decision in *Loving* v. *United States*, 310 U. S. 609	16
The application in this case	19
Commission's decision	20
Decision of court below	22
Effect of court's decision	23
Interpretation of grandfather clause	25
Principles enunciated by Commission in similar cases	27
Effect of "holding out"	30
Present case decided by Commission in accordance with established principles	33
Principles sustained by Federal and State courts and by this Court	35
II. The court below erred in finding as a fact that appellee operated as a carrier of general commodities throughout a wide territory, and in holding, upon the basis of such finding, that the order limiting the certificate to the commodities carried and points served transcended the Commission's power	38

ARGUMENT—Continued. Page

III. The court below erred in holding the order invalid on the separate ground that the Commission considered the effect upon regular-route carriers from grant, upon insubstantial evidence, of certificates to irregular-route carriers 47

CONCLUSION 51

APPENDIX 52

TABLE OF CASES

Aero etc. Application, 20 M. C. C. 633 32

Coordination of Motor Transportation, 182 I. C. C. 263 36

Crescent etc. Application, 2 M. C. C. 313 30

Dixie etc. Application, 17 M. C. C. 735 34

Eastern Carrier Corp. Common Carrier Application, 14 M. C. C. 430 ..... 30, 35

Eastern Carrier Corp. v. *U. S.*, 31 F. Supp. 232 ..... 30, 35

Eucalyptus Wood Co., Application, 16 M. C. C. 468 31

Fleming Common Carrier Application, 8 M. C. C. 469 32

Gray v. *Powell*, No. 18, decision rendered Dec. 15, 1941 15

Gulf, M. & O. R. Co. v. *Luter Motor Express*, 1 So. (2) 231 37

Howard Hall Co. v. *U. S.*, 38 F. Supp. 556 32

Howard Hall etc. Application, 24 M. C. C. 273 32

Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S. 541 19

Jones Application, 19 M. C. C. 687 ..... 32, 48

Karn's Transfer, Inc., Extension—Virginia, 21 M. C. C. 29 45

Keystone Transp. Co. etc., 19 M. C. C. 475 ..... 48, 50

Langer Application, 23 M. C. C. 302 30

Lett Application, 26 M. C. C. 159 30

Los Angeles Switching Case, 234 U. S. 294 19

Loving Common Carrier Application, 12 M. C. C. 571 ..... 16, 30

Loving v. *United States*, 310 U. S. 609, 32 F. Supp. 464 ..... 2, 13, 16, 35

McDonald v. *Thompson*, 305 U. S. 263 ..... 2, 13, 18, 19, 27

Merchants etc. Application, 21 M. C. C. 93 ..... 29, 32

Motor Bus and Motor Truck Operation, 140 I. C. C. 685 ..... 36, 45

Piedmont & Nor. Ry. v. *Comm'n*, 286 U. S. 299 27

Powell Application, 9 M. C. C. 785 30

Reliance Truck Co. Application, 4 M. C. C. 594 31

Santini Bros. v. *Maltbie*, 23 N. Y. Supp. (2d) 566 38

System Arizona Exp. Service Application, 4 M. C. C. 129 28

Texas & Pac. Ry. v. *Gulf etc. Ry.*, 270 U. S. 266 45

Union Bus Lines, Inc.—Purchase—Amberson, 5 M. C. C. 201 24

U. S. v. *Ill. Cent. R. R.*, 263 U. S. 515 45

United States v *Maher*, 307 U. S. 148 ..... 2, 13, 15, 19, 40

Page

Whinney v. Public Serv. Comm., 176 A. 753 38
Yellow Truck Lines Inc.—Purchase F & H Truck Lines 35
M. C. C. 773 24

STATUTES CITED

Motor Carrier Act, 1935:
Section 202(a) 27, 50, 52
Section 203(a) (14) 27, 52
Section 206(a) 4, 53
Section 207(a) 4, 45, 55
Section 208 ..... 25, 56
Section 210 56
Section 210(a) 57
Transportation Act, 1940:
Preface, "National Transportation Policy." 50, 57

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OPINION BELOW

The opinion of the District Court (R. 25–34) is reported in 38 F. Supp. 549. The report of the Interstate Commerce Commission (R. 6–11) appears in 24 M. C. C. 305.

JURISDICTION

The final decree of the District Court was entered April 5, 1941 (R. 34). Petition for appeal, filed May 29, 1941, was allowed the same day (R.

35). The jurisdiction of this Court is conferred by the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219, U. S. C., Title 28, Secs. 45 and 47a); Section 238, Judicial Code, as amended by Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4), U. S. C., Title 28, sec. 345); and by section 205 (h) of the Motor Carrier Act, 1935 (c. 498, 49 Stat. 543, U. S. C., Supp. V to 1934 Ed., Title 49, sec. 305 (h)).

QUESTIONS PRESENTED

The Interstate Commerce Commission by order granted, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935,[1] a certificate of public convenience and necessity authorizing appellee to continue operations as a common carrier by motor vehicle between certain points in North Carolina, on the one hand, and, on the other, certain territories and points in Maryland, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, for the transportation of the commodities which appellee had carried with some degree of regularity on the grandfather date (June 1, 1935) and thereafter; denying in other respects appellee's application for a certificate authorizing transportation of "general commodities" (all

[1] Quoted in Appendix, *infra*, p. 53; cf. *McDonald* v. *Thompson*, 305 U. S. 263; *United States* v. *Maher*, 307 U. S. 148; *Loving* v. *United States*, 12 M. C. C. 571, 32 F. Supp. 464, 310 U. S. 609.

commodities suitable for transportation in an ordinary truck, with certain exceptions) from and to all points in a territory extending along the Atlantic seaboard from South Carolina to Massachusetts. The question presented is the validity of this order. Subordinate questions are:

(1) Whether the Commission correctly interpreted the grandfather clause as permitting the issuance of a certificate authorizing transportation of general commodities throughout a wide area, over irregular and unspecified routes, only when the carrier's right thereto has been proved by a substantial showing of service rendered sufficient to establish bona fide operations. A subordinate question in this connection is whether bona fide operations are established by a mere holding out to serve generally, unaccompanied by proof of operations consistent with such holding out.

(2) Whether the court below erred in weighing the evidence and finding as a fact, contrary to the Commission's finding, that appellee operated as a carrier of general commodities throughout a wide territory and in holding, upon the basis of such finding, that because the order failed to provide for a certificate authorizing such operation, it transcended the Commission's power.

(3) Whether the court below erred in holding the order invalid on the separate ground that the Commission considered the effect upon regular-

route carriers from grant, upon insubstantial evidence, of certificates to irregular-route carriers.

STATUTES INVOLVED

The relevant provisions of the Motor Carrier Act, 1935, in effect on the date of the Commission's order, July 10, 1940, are set forth in the Appendix, *infra*, pp. 52–58.[1]

STATEMENT

The Motor Carrier Act, 1935, in section 206 (a), forbids common carriers by motor vehicle from engaging in interstate operations without a certificate of public convenience and necessity to be issued by the Interstate Commerce Commission under section 207 (a) of the Act. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under the proviso of section 206 (a)—the grandfather clause—the Commission must issue "such certificate without requiring further proof that public convenience and necessity will be served" by an applicant or predecessor in interest who was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time."

[1] The Motor Carrier Act was amended, and made Part II of the Interstate Commerce Act, by Transportation Act, 1940, 54 Stat. 898, approved September 18, 1940.

Appellee's predecessor, Mauney Transfer Co., Inc., of Cherryville (Gaston County), N. C., filed application with the Commission, solely under the grandfather clause, for a certificate authorizing operation as a common carrier of "general commodities"—that is, all commodities except those of unusual value, those in bulk, those requiring special equipment such as tank or refrigeration trucks, those injurious to other lading, livestock, automobiles, and high explosives—between all points in a broad belt extending from and including South Carolina, on the south, to and including Massachusetts, on the north, over irregular routes.[2] Competing rail and motor carriers operating in the territory filed protests against the issuance of the certificate sought (R. 7).

In November 1936, while the application was pending, two individuals bought the business and rights of Mauney Transfer Co.; in March 1937, they organized appellee corporation, which has conducted the operation since that time. Appellee was substituted as the applicant[3] (R. 7, 48, 49, 51). Hearing was held in October 1938. Appellee introduced evidence in support of the application (R. 40–178).

[2] The application also sought a certificate covering transportation of general commodities between Cherryville, N. C., and Boston, Mass., over a regular route, but this part of the application was abandoned at the hearing (R. 7, 154).

[3] Hereinafter the term "appellee" will refer to appellee's predecessor or to appellee, depending upon whether the time involved was before or after March 1937.

On July 10, 1940, the Commission, Division 5, issued a report, *Carolina Freight Carriers Corp. Common Carrier Application,* 24 M. C. C. 305 (R. 6–11), briefly stating the facts and its conclusions thereon. The report found that appellee was not a bona fide carrier of general commodities from and to all points within the extensive area claimed in the application; that it was entitled to a certificate covering the commodities which it had handled from and to the territories and points which it had served, on and subsequent to the grandfather date, with a degree of regularity sufficient to indicate bona fide operation. The report provided for the issuance of a certificate accordingly (R. 11). With the report, an order was issued denying the application in other respects [4] (R. 11).

Motor-carrier operations were commenced by appellee about 1931. It then had about three trucks, which number had increased to six or eight on June 1, 1935, and at the time of the hearing it had about 16 cargo-carrying units in operation [5] (R. 7).

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[4] The report as printed in the record (R. 6–11) contains many errors. For this reason, and since this Court takes judicial notice of the published reports of the Commission, this brief follows and quotes from the report as published in 24 M. C. C. 305, although references are given to the record print.

[5] Appellee's president testified that at the time he purchased the operating rights of Mauney Transfer the latter had only 3 or 4 motor vehicles that were in shape to operate.

Appellee was registered under the code of fair competition for the trucking industry on July 11, 1934. The certificate of registration, which was submitted in evidence (R. 7, 163–166), contains statements to the effect that 60 percent of appellee's operations were those of a contract carrier and 40 percent of its operations were those of an "anywhere for hire" carrier; that 90 percent of its traffic consisted of textile products [cotton yarn] and 10 percent consisted of other freight (R. 7).

All operations have been conducted on a "call on demand" basis, over irregular routes (R. 8).

The Commission found that appellee was principally engaged in the transportation northbound of cotton yarn shipped by mills at Cherryville, N. C., and vicinity. This commodity was shipped principally to points in eastern Pennsylvania, to New York City and adjacent points in New Jersey. There were also shipments to Hagerstown, Md., and to Pawtucket and Providence, R. I. The certificate authorizes continuance of this transportation.

Appellee also transported northbound a class of commodities—asbestos textile products (cloth, yarn, packings, tapes, tubings, and many others, R. 82)—for a manufacturer at Charlotte, N. C. They were shipped to factories in the north using such products in the manufacture of various articles, such as brake linings (R. 82, 84). The destinations were Philadelphia and North Wales, Pa.,

Trenton, Newark, Passaic, and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket, R. I., Boston and Hudson, Mass. (R. 11). The only remaining commodities transported northbound regularly were empty spools and boxes. They were shipped by the same manufacturer at Charlotte, and moved to Harrison and Perth Amboy, N. J. (R. 8, 9). Continuance of this transportation from Charlotte to the northern destinations is authorized by the certificate.

Concerning the south-bound movement, the Commission found that supplies and materials used in making asbestos textile products were transported from Harrison and Perth Amboy, N. J., to the Charlotte manufacturer; that "petroleum products in containers were transported from Sewaren, N. J., and Marcus Hook, Pa., to Columbia and Greenville, S. C., and to points throughout North Carolina. Also transported were linoleum from Paulsboro, N. J., Marcus Hook, and East Walpole, Mass., to points in North Carolina and to Spartanburg and Greenville, S. C.; canned goods from Baltimore, Md., to Shelby, N. C.; beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C., and roofing and screen wire from York, Pa., to points in North Carolina" (R. 9, 10). The certificate issued covers all this south-bound transportation. There were shipments of a few other commodities between points not served prior to the grandfather date, or which have been handled infrequently (R. 8, 9).

Appellee contended that it was entitled to the certificate applied for on the ground that it had held itself out to transport general commodities throughout the claimed territory. This contention was rejected by the Commission for the reason that, as it had frequently held in other cases, authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the grandfather clause of the Act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence; and that, in this case, there was no substantial showing of service to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the states included in the application (R. 10).

"To do otherwise," the Commission said, "would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service" (R. 10).

The Commission also rejected the contention that a carrier who has filed an application under

the grandfather clause may not be restricted to the transportation of the commodities carried during the grandfather period. After observing that section 203 (a) (14) of the Act contemplates that a common carrier may transport only "a class or classes of property," the Commission pointed out that in numerous previous cases it had found that "the authority issued under the 'grandfather' clauses of sections 206 (a) and 209 (a) of the act should reflect any limitation in the undertaking of common or contract carriers as indicated by the service actually rendered on and since the statutory dates" (R. 10).

The ultimate finding was as follows:

> We find that applicant's predecessor in interest was on June 1, 1935, and continuously since it and its predecessor have been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce (1) of cotton yarn from all points in Gaston, Lincoln, Cleveland, Rutherford, McDowell, Burke, Catawba, Alexander, Iredell, Rowan, Davidson, and Davie Counties, N. C., to Hagerstown, Md., New York, N. Y., Pawtucket and Providence, R. I., all points in Pennsylvania on and east of U. S. Highway 11,* and points

*This highway runs in a general north-south direction across the narrow neck of Maryland through Hagerstown, then proceeds across Pennsylvania through Chambersburg, Harrisburg, Sunbury, Wilkes-Barre, and Scranton to Binghamton, N. Y.

in Middlesex, Union, Essex, Hudson, Passaic, Bergen, Somerset, and Morris Counties, N. J.; (2) of asbestos textile products from Charlotte, N. C., to Philadelphia and North Wales, Pa., Trenton, Newark, Passaic, and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass.; (3) of supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth Amboy, N. J., to Charlotte, N. C., and empty spools and boxes in the reverse direction; (4) of petroleum products in containers from Sewaren, N. J., and Marcus Hook, Pa., to Columbia and Greenville, S. C., and to all points in North Carolina; (5) of linoleum from Paulsboro, N. J., Marcus Hook, Pa., and East Walpole, Mass., to points in North Carolina and to Spartanburg and Greenville, S. C.; (6) of canned goods from Baltimore, Md., to Shelby, N. C.; (7) of beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C.; and (8) of roofing and screen wire from York, Pa., to all points in North Carolina, all over irregular routes; that applicant is entitled to a certificate authorizing continuation of such operation; and that the application in all other respects should be denied (R. 10–11).

Proceedings in Court Below

Hearing before the court below on appellee's bill was held January 8, 1941. Appellee introduced a

copy of the testimony and the exhibits received by the Commission (R. 40). This evidence is a part of the record here (R. 40–138). April 5, 1941, the court rendered its opinion (R. 24–34), holding that the Commission's certificate should have authorized the transportation of all general commodities, without limitation, and should have authorized operations throughout all the territory in which appellee's operations had been substantial, without limitation to specific points. On the same date the court entered a final decree (R. 34) setting aside and annulling the Commission's order and remanding the cause to the Commission for further proceedings not inconsistent with the opinion.

SPECIFICATIONS OF ERRORS TO BE URGED

The District Court erred—

1. In finding as a fact, upon its own independent weighing of the evidence, that appellee, during the period on and after June 1, 1935, carried "general commodities," and in holding, upon the basis of that finding, that the Motor Carrier Act cannot reasonably be construed as permitting limitations in the certificate granted to such a carrier restricting it to the commodities carried and the points and territories served.

2. In holding that the Commission's order is invalid because it fails to grant a certificate to appellee authorizing it to transport general commodities throughout a wide territory.

3. In holding, as a separate ground of invalidity of the order, that the Commission exceeded its powers in considering the effect on regular route carriers if irregular route carriers were granted authority pursuant to the "grandfather" clause, to transport general commodities throughout a wide territory, over unspecified routes, when their right thereto has not been proved by substantial evidence.

4. In setting aside and annulling the order of the Commission.

SUMMARY OF ARGUMENT

The Commission correctly interpreted the grandfather clause as permitting certificates authorizing transportation of general commodities throughout a wide area, over irregular and unspecified routes, only when it can find from the evidence that the carrier's right thereto has been proved by a substantial showing of service rendered sufficient to establish bona fide operations. *Loving* v. *United States*, 310 U. S. 609; *McDonald* v. *Thompson*, 305 U. S. 263; *United States* v. *Maher*, 307 U. S. 148.

In this case the Commission found, upon consideration of all the evidence, that no substantial showing of service had been made to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the states included in appellee's application.

The court below erroneously construed the Motor Carrier Act. Its construction, which would require issuance of broad certificates to motor carriers like appellee, would to a considerable degree nullify the regulatory purposes of the Act, which sought, through its system of certificates, permits, and licenses to curb unbridled competition.

To support a grandfather application, some consistency of movement must be shown as distinguished from merely a sporadic shipment or two at remote intervals.

A mere holding out unsupported by evidence of operation consistent therewith is not enough to establish bona fide operation. The extent to which the operation is consistent with the holding out is a question of fact to be determined by the Commission upon the facts and circumstances shown in each case.

Principles enunciated by the Commission in its administration of the Motor Carrier Act, and applied in this case, have been sustained not only in *Loving* v. *United States, supra,* but in other federal court decisions and also in decisions of high state courts construing similar grandfather clauses in state statutes.

The court below erred in finding as a fact that appellee operated as a carrier of general commodities throughout a wide area, and in holding, upon the basis of such finding, that the order lim-

iting the certificate to the commodities carried and points served transcended the Commission's power. The finding of the Commission, upon its weighing of the evidence, was that no substantial showing of service had been made to establish bona fide operations in the transportation of general commodities. The court below weighed the same evidence and reached a contrary conclusion. In this it trenched upon the administrative function. *United States* v. *Maher, supra, Gray* v. *Powell*, — U. S. —, No. 18 this term, decided December 15, 1941.

In considering applications under the grandfather clause, the profitableness of the operations of the carrier and whether it will be able to continue in business, are not controlling; for the statutory dispensation is not to be enlarged by the Commission on the ground that otherwise the carrier's operations would not be profitable. An applicant for a certificate under the grandfather clause, or a carrier to whom a grandfather certificate has been granted, may at any time apply to the Commission for a certificate authorizing extension of his operations, under section 207 (a).

The court below erred in holding the order invalid on the separate ground that the Commission considered the effect upon regular-route operators from grant, upon insubstantial evidence, of certificates to irregular-route carriers. The court's holding upon this part of the case, which is to the

effect that the Commission exceeded its power in considering matters which it manifestly should consider in order to effectuate the purpose of the statute, overlooks the fundamental aims of motor carrier regulation.

ARGUMENT

I

The Commission correctly interpreted the grandfather clause as authorizing certificates for carriage of general commodities throughout a wide area, over irregular and unspecified routes, only when it can find from the evidence that the carrier's right thereto has been proved by a substantial showing of service rendered sufficient to establish bona fide operations

The decision in *Loving* v. *United States*, 310 U. S. 609.

The basic principle involved in the instant case was recently passed upon by this Court in *Loving* v. *United States*, 310 U. S. 609, which affirmed *per curiam* the decree of the specially-constituted District Court, 32 F. Supp. 464, sustaining the validity of the Commission's order in *Loving Common Carrier Application*, 12 M. C. C. 571. In that proceeding the carrier applied for a certificate authorizing transportation of general commodities between all points in five middle western states over irregular routes. The Commission found that the transportation service performed with some degree of regularity during the grandfather period consisted of seven classes of commodities principally between points in two of the states claimed. The

Commission granted a certificate authorizing this transportation, refusing to include certain other commodities infrequently carried and other points served only sporadically. Applicants urged that in determining the scope of operating authority, particular consideration should be given to the character of their holding out to serve the public as evidenced by their solicitation of various shippers, contending that since prior to the grandfather date they had offered to the public to transport general commodities between any points in the states covered by the application. The Commission pointed out that in considering numerous applications presenting like issues, it had held that an applicant must have been in actual operation on the statutory date, and that a holding out to serve is not sufficient in and of itself to establish bona fide operations as that term is used in section 206 (a), in the absence of evidence of operations consistent with such holding out. While in that proceeding the holding out may have been of the extensive character claimed, it did not view the actual transportation performed as justifying a finding that applicants were in bona fide operation in a larger territory than that in two of the states claimed.

In the District Court plaintiffs contended that the grandfather clause is to be interpreted as meaning that a certificate shall be granted to any carrier who has assumed the obligations of a com-

mon carrier and has held himself out as such, and that the certificate should authorize his continued operations as a common carrier of all commodities, and over all routes and within all territories which he assumed to serve. The court refused to follow this contention, stating that many of the questions raised had been settled by recent decisions of this Court, including *McDonald* v. *Thompson*, 305 U. S. 263, and held that the mere ability to serve, as well as the holding out to the public to carry for hire is insufficient to satisfy the statutory requirement of bona fide operation. The court said: "A mere offer to perform a service, without any actual performance thereof, on and prior to the 'grandfather' date, is not sufficient to authorize the issuance of a certificate of convenience and necessity by the Commission. An occasional service, infrequently performed prior to June 1, 1935, unless such service is seasonal, is insufficient, as there must be a bona fide operation to warrant the issuance of a certificate by the Commission without proof as to the necessity and convenience to be served by the granting of such authority." The court further held: "The purpose of the Act is regulatory, and we believe that the 'grandfather clause' was included therein for the benefit of carriers who had been in bona fide operation on and prior to the 'grandfather' date, rather than for the serving of public convenience. Adequate provision was contained in the Act for

the granting of certificates upon proper showing that there was public necessity for such service, or that a public convenience will be served. We, therefore, cannot accept such reasoning of plaintiffs for a strained construction of the Act. Too, we can imagine possible defeat of the purpose intended to be achieved by enactment of the particular Congressional Act, by the granting, under the 'grandfather clause', of numerous permits where there have been mere offers to perform service without in fact actual performance thereof." A decree was entered dismissing the bill. Upon appeal to this Court the decree, as we have seen, was affirmed in a *per curiam* decision, which cited *McDonald* v. *Thompson*, 305 U. S. 263, 266; *United States* v. *Maher*, 307 U. S. 148, 153–154; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547–548; *Los Angeles Switching Case*, 234 U. S. 294, 311–312.

The decision in that case, in which the facts were similar to those here, and the principle identical, would seem to be controlling in this case.

The application in this case.

Appellee's application sought a certificate authorizing interstate transportation of general commodities, with the exceptions noted, throughout the Atlantic seaboard area extending from Georgia on the south to New Hampshire on the north, each point in each of the states in this ex-

tensiye area to be a permissible point of origin and each point in each of the other states to be a permissible point of destination, with the consequent right to operate over any and all interstate routes within the area.

Commission's decision.

In the judgment of the Commission the facts established did not support this application. Appellee's headquarters were located at Cherryville, N. C., a town of about 3,000 population, where it maintained its warehouse and office (R. 71). On the grandfather date appellee's predecessor operated not more than 8 trucks (R. 7, 63), and this number had fallen to 3 or 4 when appellee acquired the business in March 1937 (R. 45, 46). The carrier has not maintained a regular route operation (R. 46, 154), has not operated its vehicles over specified routes (R. 46–47), nor maintained any regular or scheduled operations (R. 47). It has served principally an area in North Carolina within a radius of 75 miles of Cherryville, calling at particular points to pick up shipments only when requested to do so (R. 132, 140). Its principal northbound operations both before and after the grandfather date consisted of the transportation of cotton yarn from points near Cherryville to northern points. Aside from this, its only other northbound commodities moving with a degree of regularity were those forwarded by the asbestos-textile manufacturer at

Charlotte. These shipments were destined to particular points, and went as far north as Boston. In order to avoid returning southbound with empty trucks, appellee sought paying loads (R. 103, 119), and it succeeded in obtaining customers at certain particular points, for whom it carried particular commodities, such as petroleum products in drums for an oil company at Marcus Hook, Pa., and another at Sewaren, N. J., to a number of points in North Carolina and a few in South Carolina. Since its northbound operations were not on any regular schedule, its trucks moving only when there was a call from shippers (R. S. 132, 134), and the movements were to widely scattered points in the north, its trucks were not at any particular northern point at any particular time. They would happen to be at a particular place only occasionally, sometimes rarely. It had no stations, no physical facilities, no representatives at any of these northern points, nor any office except one at New York (R. 47). Hence it could hardly be said that in any real sense it served these points as a bona fide common carrier of general commodities. When consideration is given to the very great number of cities, large and small, throughout the populous industrial region embraced within the territorial limits of appellee's claimed theater of operations, and the large and diversified volume of freight, both domestic and foreign, moving constantly to and from shipping

points in that region, it would hardly seem possible that appellee, with its small carrying capacity, could have furnished a bona fide operation from and to all these points for the transportation of general commodities.

Upon consideration of all the evidence of record, the Commission found that "it is clear that no substantial showing of service has been made to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the States included in the application" (R. 10).

Appellee failed to prove its right to the extensive authority sought, but was entitled to authority to continue *bona fide* operations of the scope, both as respects the commodities handled and the points and territories served, which it had conducted during the grandfather period. This authority was granted. The court below conceded that appellee was not entitled to the certificate for which it applied (R. 34).

Decision of court below.

The court below, in addition to setting aside the order in this case, found also that like holdings of the Commission in similar cases were erroneous (R. 28), and thus reversed the underlying principle which has governed the disposition of many applications of this kind.[1] The court held that it

[1] During the 120-day period specified in section 206 of the Act, 80,925 grandfather applications were filed with the Commission. Ann. Rep., I. C. C., 1936, p. 88.

is unreasonable to limit the certificate of one who has functioned as a general carrier to the specific commodities carried and the specific points served;* that the law cannot reasonably be construed as authorizing such limitation (R. 33); that the Commission should pass upon the application in the light of the principles laid down by the court, and without the limitations which the court condemned, and grant to appellee a certificate covering the territory in which it finds that appellee carried on substantial operations as a common carrier during the grandfather period (R. 34).

Effect of court's decision

The court's opinion seems to be clear in directing that the Commission shall issue a certificate covering general commodities, apparently both northbound and southbound. Under the opinion the certificate must in no instance limit the scope of operations to particular points but must authorize operations to and from all points within "*the territory* in which it finds that appellee carried on substantial operations * * *." [Italics ours.] The certificate directed by the court would apparently authorize appellee, now or at any time

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*As shown by its report, the Commission did not in all instances limit the carrier to the specific points served, and, where the transportation was from or to a sufficiently large number of points in a territory, the Commission included the territory in the certificate, thus authorizing transportation from all points or to all points therein.

in the future,* to function as a carrier of general commodities from Boston, New York, Philadelphia, Baltimore, Jersey City, Newark, Harrisburg, Reading, Wilkes-Barre, Scranton, and numerous other cities, large and small, throughout the populous industrial area of the northeast, and since the certificate may not be limited to specific points, it would necessarily include at least some *territory* adjacent to these places or, possibly, blanket in the entire northeastern territory.

The effect of the decision seems clearly to be that the carriers such as appellee, operating wholly or partly as "anywhere for hire" carriers, over irregular and unspecified routes, on a "call on demand" basis only, in a wide territory, must be given a certificate permitting them to solicit and carry any and all commodities (with only a few exceptions) between all points throughout the territory, provided only that they have done some substantial business, perhaps even in only one commodity, between certain points in the ter-

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* The certificates issued by the Commission are permanent, being subject to revocation only for wilful failure to comply with statutory provisions or regulations of the Commission, under section 212. Moreover, being salable and transferable under section 212 (b) and section 5, Interstate Commerce Act, as amended, they have in themselves a money value. *Union Bus Lines, Inc.—Purchase—Amberson*, 5 M. C. C. 201, 205; *Yellow Truck Lines, Inc.—Purchase—F & H Truck Lines*, 35 M. C. C. 773, 777.

ritory, the certificate to be unlimited as to commodities and as to specific points.[10]

We think that the court's construction of the Motor Carrier Act is erroneous, and that it would in an important respect and to a considerable degree nullify the regulatory purpose of the Act.[11]

Interpretation of grandfather clause

The Act requires, as a condition to the grant of a certificate under the grandfather clause, that there shall be a showing, and a finding by the Commission, of *bona fide operation* by the carrier on and after June 1, 1935. Section 208 (a) requires that any certificate issued "shall specify the service to be rendered," in addition to the routes, points, and territory to be served. Under these provisions the Commission must determine not merely whether the carrier was in actual operation during the statutory period, but also what service the carrier has performed during that period—what class or classes of commodities it carried and what points and territories it served. It must determine the nature and extent of its bona

[10] "Many operators, particularly common carriers, have regular routes, but many more do not, *and there are thousands who go anywhere for hire, at least within a specified territory.* * * *"—Fourth Report, Federal Coordinator of Transportation (House Doc. 394, 74 Cong., 2d Sess., Jan. 21, 1936, pp. 26–27). [Italics ours.]

[11] "The system of certificates, permits, and licenses is of basic importance in the scheme of regulation * * *." (Annual Report, I. C. C., 1936, p. 71.)

fide operations. It acts in this regard only upon application filed; obviously, it must determine whether the bona fide operations are as extensive, both with respect to commodities and points or territories, as claimed in the application.

With respect to commodities, it is to be observed that, generally speaking, motor carriers, unlike the railroads, have not been carriers of general freight.[12] In a great many instances they have carried only one, or a few comodities, frequently only "high class" freight,[13] although many of them claimed they were willing to take any freight offered. The existence of many carriers of this type was well known; this is reflected by the definition of "common carrier" in the Motor Carrier

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[12] In the fourth Report of the Federal Coordinator of Transportation (House Doc. 394, 74 Cong., 2d Sess., Jan. 21, 1936), at pp. 26–27, it was stated:

> * * * property carriers * * * are of many kinds and descriptions. Some are common carriers, but many of these confine their operations to *special commodities*. * * *
>
> In general, they are small enterprises. A great number are individuals operating only a single truck. * * * Nobody yet knows how many motor carriers will be subject to the jurisdiction of the Commission, but there seems reason to believe that the number of common and contract carriers and brokers will be upwards of 100,000 and perhaps as high as 200,000. [Italics ours.]

[13] See second Coordinator report, Senate Doc. No. 152, 73d Cong., 2d Sess. (1934), pp. 15 ff., 23–24, 33, and reference to trucks taking the "cream of the traffic" from the railroads, p. 16.

Act, section 203 (a) (14), as including carriers of property "or any class or classes of property."

The grandfather clause is to be interpreted in the light of the Act as a whole and of the public purposes it was intended to accomplish. These were expressly declared in section 202 (*infra*, p. 52). Among the ills sought to be alleviated, as stated by the report in this case, were congestion of highways, destructive rate practices, and unbridled competition. This Court held, in *McDonald* v. *Thompson*, 305 U. S. 263, 266: "As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."[14]

Principles enunciated by Commission in similar cases.

As shown by the Commission's reports in cases heard,[15] a great many grandfather applications were filed by small concerns operating only one or a few trucks, in the transportation of certain particular commodities, although many of them claimed they held themselves out to transport gen-

[14] Citing *Piedmont & Nor. Ry.* v. *Comm'n*, 286 U. S. 299, 311, in which the Court said: "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

[15] The statute does not require a hearing; a large number of applications were disposed of through informal investigation and conferences. Usually, hearings have been held only where protests were filed.

eral commodities. In some instances the operation was between specific points or "fixed termini" over regular routes; in many others, the operation was of the "anywhere for hire" character, usually within a defined territory and frequently with a more or less definite starting point or territory. Many of such carriers, like appellee, had incidentally and sporadically transported several commodities other than their "specialties" and the question arose whether their certificates should cover all commodities or only those carried with some degree of regularity. In passing upon such applications, the Commission has consistently taken the view that the application should be granted only when the carrier's right thereto has been proved by substantial evidence. Because of the difficulty, if not the impossibility, of laying down any comprehensive rule as to the showing required to establish a bona fide operation within the meaning of the Act, it expressed the view, in *System Arizona Exp. Service Application,* 4 M. C. C. 129, 133, that it seems clear "that some consistency of movement must be shown as distinguished from merely a sporadic shipment or two at remote intervals. Beginning with the statutory date, and continuously thereafter, there should be shown some consistency of service, either a regular service or an irregular service of such consistency and continuity as to be undoubted. The frequency and volume required to be shown would

depend on what would reasonably be expected of an operator endeavoring to give a good-faith service to a particular place, or over a particular route, having in mind the size, location, and accessibility of the place and the quality of the route."

This test was applied in *Merchants, etc., Application,* 21 M. C. C. 93, a case similar in all general respects to the present one, and the Commission found that although applicant requested authority to transport general commodities, the evidence did not justify the granting of such authority except perhaps with respect to operations between Terre Haute and Chicago; that no substantial evidence had been presented to prove the carrier's right to authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the "grandfather" clause. With respect to that applicant's operations between Chicago and Terre Haute, the Commission said, "the term 'general commodities' is entirely too comprehensive to be used in connection with any authority herein granted, especially when one considers the size, location, and accessibility of the various large cities within the territory involved. Accordingly, the record warrants the conclusion that applicant has been engaged in transportation, in interstate or foreign commerce, only of those commodities which are set forth in appendix B attached" (*Ibid.,* 103).

Other cases involving the same principle, and in which the Commission has reached the same conclusion, are: *Powell Application,* 9 M. C. C. 785, 791–792; *Loving Common Carrier Application,* 12 M. C. C. 571; *Eastern Carrier Corp. Common Carrier Application,* 14 M. C. C. 430; *Langer Application,* 23 M. C. C. 302, 305; *Lett Application,* 26 M. C. C. 159, 165.

Effect of "holding out".

The contention has been made by many applicants, as in the present case, that they were entitled to certificates covering general commodities throughout a broad territory on the ground that they have held themselves out to conduct such transportation. It is the view of the Commission that a mere holding out without evidence of operation consistent therewith is not enough to establish bona fide operation. As stated in an early case, *Crescent etc. Application,* 2 M. C. C. 313, any certificate or permit issued pursuant to the grandfather provisions of sections 206 (a) or 209 (a) "must necessarily be predicated upon the motor-carrier operations engaged in by applicants on the respective statutory dates and continuously since that time, and a mere holding out, or offer to operate, on the specified dates, is not the equivalent of bona fide operation, as that term is used in those sections. The burden of proof is upon applicants to establish the character and scope of their operations." As observed by the

Commission, however, in *Reliance Truck Co. Application,* 4 M. C. C. 594, the word "operation" is not to be too narrowly construed, and in that connection the holding out of the carrier must be taken into consideration. "For example, in the case of a common carrier of household goods or of oil-field supplies serving a large territory over irregular routes, we grant certificates under the 'grandfather' clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting 'grandfather' certificates to haul 'general commodities,' that each and every commodity within that description has actually been carried. The question is whether there has been operation within the 'grandfather' period consistent with the holding out in the natural and normal course of business."

In *Eucalyptus Wood Co. Application,* 16 M. C. C. 468, the applicant sought a certificate covering operations from Los Angeles, Calif., to an area centering about Silverpeak, Nev. The Commission, after observing that the Silverpeak area is devoid of industrial or commercial enterprises of any consequence except mining, and catering to the needs of those engaged in that industry, and that the mining operations were largely affected by market conditions and tended to shift from one point to another, stated that the situation appeared to be substantially similar to that

presented in the servicing of oil fields or in the moving of household goods; that these operations within a sizable territory are necessarily irregular as to points served and frequency of service. "For these reasons and because of the specialized nature of the service, we have consistently held that not only the services actually performed during the 'grandfather' period but also the holding out to serve any point within the territorial scope of the applicants' operations must be considered. * * * The controlling fact in such cases is whether there has been substantial operation within the 'grandfather' period consistent with the holding out in the natural and normal course of business." See *Jones Application*, 19 M. C. C. 687, 692; *Howard Hall etc. Application*, 24 M. C. C. 273, 274;[16] *Aero etc. Application*, 20 M. C. C. 633; *Fleming Common Carrier Application*, 8 M. C. C. 469;[17] compare *Merchants etc. Application, supra*, where, in passing upon a "grandfather" application for a general commodity certificate between points in Illinois, Indiana, Ohio, Pennsylvania, New York, etc., the Commission considered the size, location, and accessibility of the various large cities within the territory.

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[16] The order in that case was sustained by the District Court, *Howard Hall Co.* v. *United States*, 38 F. Supp. 556. Appeal has been taken to this Court, No. 210, this Term; it is set for argument immediately following this case.

[17] The validity of the certificate issued in the *Fleming* case is before this Court in No. 110, *Alton R. Co.* v. *U. S. et al.*

Present case decided by Commission in accordance with established principles.

These principles were followed by the Commission in deciding the case at bar. The findings in the report, together with the supporting evidence, show that appellee was principally engaged during the grandfather period in the transportation of cotton yarn from points in North Carolina within 75 miles of Cherryville to certain northern points (R. 8, 9). While most of these shipments moved principally from 10 points, the Commission found that applicant had held itself out to transport this commodity from all points in a territory in North Carolina east of Asheville comprising 12 counties, and actually conducted an operation consistent with such holding out. Accordingly, the certificate was not restricted to the specific points from which applicant had transported shipments, but included all points within the 12 counties. In other instances also the evidence of operation was deemed sufficient to warrant inclusion in the certificate of territories. This is true as to a destination territory comprising the five boroughs of New York City and the adjoining territory of eight counties in New Jersey, and the territory in Pennsylvania on and east of U. S. Highway 11, for northbound cotton-yarn traffic. The certificate also includes the entire state of North Carolina as destination territory for southbound traffic in petroleum products shipped from Sewaren, N. J., and Marcus Hook, Pa., in lino-

leum from several points of origin, and in roofing and screen wire shipped from York, Pa.

But it was the Commission's conclusion that the evidence was not sufficiently substantial to prove operations consistent with a holding out to transport general commodities throughout the wide territory claimed.[18] This conclusion is expressed in the report as follows:

> On the basis of all the evidence, it is clear that no substantial showing of service has

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[18] It may be noted that the evidence of holding out in this case is very meagre. There is no evidence of a holding out to transport general commodities in the form of a published tariff distributed to shippers, or of advertising, or of solicitation except locally in North Carolina through a firm of freight brokers. (Compare *Dixie, etc., Application*, 17 M. C. C. 735, 741.) There was evidence that when one of appellee's trucks was about to start with a north-bound load, a telegram was sent to a northern shipper seeking a return load south-bound (R. 119).

It was admitted that shipments were not solicited for points north of New York City (R. 62). If, however, shipments to that territory were offered, appellee would take them. But such shipments were rare except in the case of asbestos textile products forwarded by the Charlotte manufacturer. These shipments were taken with some degree of regularity to New York City, to certain Pennsylvania and New Jersey cities and to certain points north of New York City, viz, Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass. Authority to continue this service was included in the certificate. However, this brief assumes *arguendo* that there was in fact a holding out to transport general commodities from and to all points in the wide territory claimed by appellee. The Commission deemed the fact immaterial, finding to the effect that even if there were such a holding out, the evidence was not sufficiently substantial to prove operations consistent therewith.

been made to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the States included in the application" (R. 10).

Principles sustained by Federal and State courts and by this Court.

We have hereinabove reviewed the decisions in *Loving* v. *United States*, 310 U. S. 609, 32 F. Supp. 464, sustaining the Commission's order in a case decided in accordance with the principles explained above, and found to be controlling in the present case.

In *Eastern Carrier Corp.* v. *United States*, 31 F. Supp. 232, sustaining 14 M. C. C. 430, *supra*, it was contended that plaintiff had shown such bona fide interstate transportation of general commodities as would entitle it to a grandfather certificate. The Commission found that plaintiff had transported other commodities than those covered by the certificate issued but that such operations had been more or less sporadic and not continuous since June 30, 1935. The court entertained "no doubt that the Commission under the Act has the power to restrict the plaintiff to the type of service it was performing on June 1, 1935, not only as to the routes operated but also as to the class of commodities which it carried"; and that "while the Act does not confer such power in express terms we think that the existence of such a power is implicit in its provisions." The Court said further:

In *United States* v. *Maher, supra,* the Supreme Court stated * * * by Mr. Justice Frankfurter, "The recognized practices of an industry give life to the dead words of a statute dealing with it." By the enactment of the Motor Carrier Act Congress intended to regulate the motor-carrier industry. Those who drafted the Act were well aware that carriers by motor vehicle were specializing in the transportation of particular commodities. It was obviously the intention of Congress by the enactment of the grandfather clause to preserve to the carrier its right to transport commodities or articles in commerce of the kind which it was transporting on June 1, 1935.[19]

* * * the transportation of general merchandise by the plaintiff and its predecessor was sporadic and entirely incidental to its chief business, which was that of

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[19] See Hearings on H. R. 5262 and H. R. 6016, 74th Cong., 1st Sess., 1935. The Commission conducted two comprehensive investigations (see *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685 (1928); *Coordination of Motor Transportation*, 182 I. C. C. 263 (1932), see also 1932 Annual Report, I. C. C., pp. 18–23). The subject was intensively studied by the Federal Coordinator of Transportation who recommended legislation for the regulation of motor carriers. See Fourth Report of the Federal Coordinator of Transportation on Transportation Legislation, January 21, 1936, House Doc. 394, 74 Cong., 2d Sess., pp. 26–27. The Coordinator's second report Regulation of Transportation Agencies, March 10, 1934, Senate Doc. 152, 73 Cong., 2d Sess., deals comprehensively with motor carriers.

transporting silk, rayon hosiery, and commodities for mills processing or manufacturing such commodities.

In *Gulf, M. & O. R. Co.* v. *Luter Motor Express,* 1 So. (2) 231, the Supreme Court of Mississippi set aside a certificate issued by the Mississippi Commission which granted an application for a certificate to operate as a common carrier by motor vehicle of commodities generally over regular routes and between fixed termini. The application was based solely upon a grandfather clause in the State statute similar to that in the Federal Motor Carrier Act. The court held: "* * * One who was operating on the date aforesaid as a restricted carrier cannot avail of the grandfather proviso to obtain a certificate of convenience and necessity as a general common carrier. Here the record shows that what appellee had carried had been fresh cream, oil, and other petroleum products, and that such other things as were carried were merely casual, and were of comparatively rare occurrence. These sporadic or occasional incidents cannot be enlarged into the creation of a right to be certified, under the grandfather clause, as a common carrier of everything which may be transported by motor vehicle, as the order of the Commission attempted to do in this case."

Upon the question of holding out, the court said: "Nor does the fact that the carrier held himself out as ready, able, and willing to carry

any and everything for any and everybody change the legal situation so far as the grandfather proviso is concerned. What was actually and ordinarily done on and before the date mentioned is the test, and the burden of proof in such matters rests on the applicant; and, as already stated, that proof must be definite and well sustained, whence it follows that statements by a witness or witnesses which are phrased in terms of generalities are not sufficient."

Finally it observed that "the principles of procedure and adjudication outlined herein will be found in accord with what has been said" in numerous decisions of the Interstate Commerce Commission and of the Federal courts, which it cited, including the *Eastern Carrier Corp.* case, the *Loving* case, and the *Maher* case, *supra.* See also *Santini Bros.* v. *Maltbie,* 23 N. Y. Supp. (2d) 566; *Whinney* v. *Public Serv. Comm.,* 176 A. 753.

II

The court below erred in finding as a fact that appellee operated as a carrier of general commodities throughout a wide territory, and in holding, upon the basis of such finding, that the order limiting the certificate to the commodities carried and points served transcended the Commission's power

The court below agreed that a mere holding out by a common carrier is not enough to bring him within the protection of the grandfather clause, since the statute provides that he must have been

in bona fide operation as a common carrier within the territory; and this bona fide operation means, in the court's judgment, that he must have done such a substantial volume of business within the territory that he could reasonably be said to be operating therein as a common carrier. Nevertheless, the court held appellee to be a carrier of general freight, that it was willing to haul any freight that it was offered, outside of the specialties requiring specialized equipment, and did substantial business of this character, and that, being a common carrier of general freight during the grandfather period, it became entitled to a certificate on the same basis (R. 30–31).

Thus, while apparently agreeing with the Commission in principle, the court gives a different weight to the evidence and holds, contrary to the Commission's finding, that the business done was sufficiently substantial to require issuance of a certificate to appellee as a carrier of general freight.

Authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the grandfather clauses of the Act, should be granted to a carrier, in the judgment of the Commission, only when such carrier's right thereto has been proved by substantial evidence. It is not necessary that the evidence show that the carrier has transported all general commodities and has served each and

every point in the territory, but the evidence must make a showing of service sufficiently substantial in the judgment of the Commission to establish that the carrier did conduct bona fide irregular-route operations in the transportation of general commodities in the territory. In the judgment of the Commission the evidence here was not sufficiently substantial. Its finding was,

> On the basis of all the evidence, it is clear that no substantial showing of service has been made to establish bona fide irregular-route operations in the transportation of general commodities from and to all points in the States included in the application (R. 10).

The court below weighed the evidence and reached a contrary conclusion.

In this we think it trenched upon the administrative function. In *United States* v. *Maher, supra,* this Court said:

> By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction to enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. *Their determination Congress entrusted to the Commission.* [Italics ours.]

See also the decision of this Court in No. 18, *Gray* v. *Powell*, rendered December 15, 1941.

The court below in its opinion characterized the Commission's decision in this case as "quite without precedent," but, as shown above, the principles on which it rests have been followed by the Commission in deciding numerous similar cases, by State Commissions administering local laws for the regulation of motor carriers which contain similar grandfather clauses, and these decisions have been sustained by the State courts, by the federal district courts, and by this Court.

The court below, after stating the contention of plaintiff that the limitations of the order are unreasonable and not authorized by law, expressed the view that "they amount to a *reductio ad absurdum* of the position taken by the Commission in this and a number of other cases to the effect that classification justifies limitation of 'grandfather' certificates to specific commodities shown to have been transported between specific points." It is not our understanding that this is the holding of the Commission. It has pointed out that common carriers handling a class or classes of property are subject to the Motor Carrier Act, under section 203 (a) (14). Certificates under the grandfather clause in cases of this kind are issued in accordance with the principles above explained, and it is of little moment as to how the carriers would be classed under the class-

ification adopted by the Commission, 2 M. C. C. 703. It may be noted, however, that one of the 17 classes there described would apparently fit appellee, namely, Class 17, "Carriers of specific commodities not subgrouped," in reference to which the Commission explained that "Throughout the country there are individual truck operators who engage in the transportation of some specific commodity or commodities which do not fall within any of the commodity subgroups included in this classification." But this classification is not controlling in the determination of grandfather rights. The court below, upon its own weighing of the evidence, reached the conclusion, contrary to the Commission's that appellee is a carrier of general commodities, and in support of its view it gave considerable weight to the Commission's classification, as indicated by its opinion, whereas the Commission, in its report, did not refer to it, and apparently deemed it of no weight in determining appellee's application.

The court referred to and quoted from the brief of the *amicus curiae,* which criticized the certificate granted, on the ground that under it "applicant would be permitted to transport cotton yarn to many destinations and territory to which it would be denied the right to transport on the same trip asbestos textile products, and correspondingly would be permitted to handle asbestos textile

products to Boston and Hudson, Mass., although on the same trip it would not be permitted to haul cotton yarn." This criticism fails to give effect to the evidence, which shows that the asbestos textile products were transported by appellee in full truckload quantities (R. 82) from Charlotte only (R. 75) to particular destinations in the North where factories were located which used these materials (R. 82–84). The evidence shows that they were shipped to Philadelphia and North Wales, Pa., but does not show that they were shipped to any other point in eastern Pennsylvania, or that the Charlotte manufacturer had occasion to ship them to other points in that territory (R. 77). Although appellee did not solicit business north of New York, it would take these shipments for the Charlotte manufacturer to Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass. This was remunerative traffic, and appellee was willing to transport it to these New England points despite the fact that it did not hold itself out to carry to that territory and did not solicit general traffic for movement beyond New York (R. 10). Concerning the statement quoted in the court's opinion that appellee transported ten shipments of cotton yarn to points in Massachusetts prior to the "grandfather" date, it is true the report so finds, but Exhibits 1 and 4 show no shipment of this commodity to any Massachusetts point since June 1, 1935. For this rea-

son the certificate did not cover cotton yarn to Massachusetts. The certificate in this and other respects referred to by the *amicus curiae* reflects appellee's irregular operations.

The opinion of the court below, referring to appellee's contention "that the effect of thus limiting the order will be to put it out of business," stated "it is manifest that this must be true since it is hardly conceivable that a truck company could do business if allowed to carry loads in only one direction, and the limitations imposed by the order will render it practically impossible for the trucks of plaintiff to obtain freight when returning south." But the evidence does not show that appellee's trucks were always able to get a return load. Nor is there evidence from which a conclusion could be reached that appellee would be unable to operate profitably without return loads. The evidence indicates, as previously shown, that appellee's trucks were able to obtain with a degree of regularity return loads from particular shippers at particular northern points, for example, from oil companies at Sewaren, N. J., and Marcus Hook, Pa. This transportation is authorized by the certificate. Whether appellee's business will be unprofitable under the certificate issued is speculative, since there is no evidence from which a conclusion on this question could be reached. In considering applications under the grandfather clause, the profitableness of the operations of the carrier

and whether it will be able to continue in business, are not controlling. For the statutory dispensation is not to be enlarged by the Commission on the ground that otherwise the carrier's operations would not be profitable. See *Texas & Pac. Ry.* v. *Gulf etc. Ry.*, 270 U. S. 266, 277; *U. S.* v. *Ill. Cent. R. R.*, 263 U. S. 515, 525. Cf. *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 736–738. An applicant for a certificate under the grandfather clause, or a carrier to whom a grandfather certificate has been granted, may at any time apply to the Commission for a certificate authorizing extension of his operations, under section 207 (a).[20]

As indicating that, in its opinion, appellee was a carrier of general commodities, the court lists a number of commodities which it found from an examination of the record were transported by appellee prior to June 1, 1935. But the list includes commodities carried only occasionally or incidentally, with long intervening periods, or in isolated instances, and several which the appellee carried only once in a 5-year period. This is true as to screen cloth, electrical supplies, plumbing supplies, and Brazil nuts. Appellee has carried only two shipments of bedspreads; only two shipments of paper. For a certain period it carried tires for a tire company at Charlotte but that

[20] A very large number of such cases appear in the Commission's motor carrier reports. One is *Karn's Transfer, Inc., Extension—Virginia*, 21 M. C. C. 29.

company closed its plant in September 1935 (R. 43–45), and the record contains no evidence that appellee has carried tires since then. Many of the commodities mentioned by the court are included in the certificate, namely, cotton yarn and warps, beams, cones and skeins of cotton yarn, petroleum products, canned goods, linoleum rugs, roofing, asbestos products, beer, spools, empty barrels, and boxes. In view of the infinite variety of articles of commerce susceptible of transportation in ordinary trucks (of which there are literally several thousand), the Commission could reasonably find upon the evidence showing the relatively small number of commodities handled by appellee, that it was not, in fact, a carrier of general commodities.

In reaching a conclusion upon the evidence as to whether appellee was in bona fide operation as a carrier of general commodities, it was permissible for the Commission to take into consideration the small number of trucks in operation by appellee, the fact as indicated by appellee's own evidence that most of its business consisted of cotton yarn and asbestos textile products for particular mills, that these commodities were shipped for long distances, requiring appellee's trucks to be on the roads for considerable periods of time, leaving little capacity for appellee to handle other business except incidentally and to a small extent.

III

The court below erred in holding the order invalid on the separate ground that the Commission considered the effect upon regular-route carriers from grant, upon insubstantial evidence, of certificates to irregular route carriers

The court found, as a separate ground of invalidity of the order, that the limitation which it imposes with respect to irregular-route carriers is not imposed with respect to carriers on regular routes and is admittedly imposed by it for the protection of regular-route carriers. The court said:

> * * * The Commission so states in the portion of its opinion quoted above, wherein the Commission said: "Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service." But Congress has made no such distinction between common carriers by regular and those by irregular routes; and, for the Commission to make such distinction is to add to the act of Congress in favor of one class of carriers and against another. This the Commission cannot do (R. 33).

But the Commission's reports show that the same criterion is applied to both regular and

irregular-route carriers. This is illustrated by *Jones Contract Carrier Application,* 19 M. C. C. 687, in which the Commission granted a certificate to operate as a common carrier of one commodity from San Antonio, Tex., to Los Angeles, Calif., and of six commodities in the opposite direction between the same points, over a regular route. The application sought a certificate covering general commodities; and applicant contended that all kinds and classes of commodities were at all times solicited and hauled to the extent they were obtained. The Commission found that applicant was not hauling general commodities but principally one commodity westward and six eastward. It held that "In order to be entitled to 'grandfather' rights with respect to the hauling of general commodities, there should be some greater showing than has been made herein that a diversified class of commodities was actually being handled consistent with any holding out in that respect on and prior to the statutory date."

Further, we think the court's holding takes too circumscribed a view of the purpose of the Motor Carrier Act. As pointed out by Chairman Eastman, concurring in *Keystone Transp. Co. etc.,* 19 M. C. C. 475, 491:

> The common carrier is required to serve the general public within the limits of its facilities * * *. The more important common carriers operate largely over regular routes and between fixed termini.

> Generally they are forced by the diversity of their customers to operate on regular schedules, carrying large and small shipments between many points, and to maintain terminals and freight-solicitation facilities. When so doing, their operating costs tend to rise, requiring the maintenance of rates and charges sufficient to permit a profitable operation as a whole.

If authority were granted to a carrier, pursuant to the grandfather clause, to operate over irregular and unspecified routes for the transportation of general commodities throughout a wide territory, without proof by substantial evidence of their right thereto, such carriers would thereby obtain official sanction to invade the regular routes to obtain the cream of the traffic available thereon in so-called irregular-route service. Such action would contravene the purpose of Congress—

> 'to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices;' and 'develop and preserve a highway transportation system properly adapted to the needs

> of the commerce of the United States and of the national defense.' (Sec. 202, Motor Carrier Act.)[21]

As further stated by Chairman Eastman in the *Keystone* case, *supra*:

> This declaration of policy is a succinct statement of the ultimate purpose which Congress desired to accomplish through the act, and it reflects the evils which then existed and which Congress sought to remedy. The transportation industry was plainly in an unsound economic condition; competition was running wild, unjust discriminations abounded, facilities were being multiplied without plan and in disregard of public need, and both carriers and shippers were suffering. The Motor Carrier Act was part of a plan to bring these conditions under rational control, and it aimed to achieve good order in the motor-carrier industry and stabilize and strengthen it for the public good. The whole act and all of its provisions are to be read in the light of the declaration of policy which set forth these ends (P. 497).

The court's holding on this part of the case, which is to the effect that the Commission exceeded its power in considering matters which it

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[21] A general declaration of "National Transportation Policy," *infra*, p. 57, applicable to rail, motor, and water carriers, was made in Transportation Act, 1940, superseding the declaration of policy in section 202, Motor Carrier Act, 1935.

manifestly should consider in order to effectuate the purpose of the statute, seems to overlook the fundamental aims of motor-carrier regulation.

CONCLUSION

It is respectfully submitted, for the reasons above stated, that the decree of the District Court should be reversed.

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DECEMBER 1941.

APPENDIX

Statutes involved

The pertinent provisions of the Motor Carrier Act, 1935, applicable at the date of the Commission's order, July 10, 1940 (c. 498, 49 Stat. 543; c. 811, 52 Stat. 1236), are as follows:

SEC. 202. [U. S. Code, Sup. V, title 49, sec. 302.] (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportaion by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

SEC. 203. [U. S. Code, Sup. V, title 49, sec. 303.] (a) As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person who or which

undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor-vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

SEC. 206. [U. S. Code, Sup. V, title 49, sec. 306.] (a) Except as otherwise provided in this section and section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity

will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by

regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SEC. 207. [U. S. Code, Sup. V, title 49, sec. 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

SEC. 208. [U. S. Code, Sup. V, title 49, sec. 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

SEC. 210. [U. S. Code, Sup. V, title 49, sec. 310.] No person, after January 1, 1936, shall at the same time hold under this part a certificate as a common carrier and a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that

such certificate and permit may be held consistently with the public interest and with the policy declared in section 202 (a) of this part.

SEC. 210a. [U. S. Code, Sup. V, title 49, Sec. 310a.] (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

The "National Transportation Policy," declared by Congress in Transportation Act, 1940 (54 Stat. 898, 899), and incorporated as a preface to the Interstate Commerce Act, reads as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation serv-

ices, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

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